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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NATALIE ANN BLICKENSTAFF, as Trustee, etc.,	E070538
Plaintiff and Respondent,	(Super.Ct.No. PROPS1301068)
v.	OPINION
STEVEN ROBERTSON CUMMING,	
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Stanford E. Reichert, Judge. Affirmed.

Steven Robertson Cumming, in pro. per., for Defendant and Appellant.

The Law Office of Jennifer Daniel and Jennifer Daniel for Plaintiff and Respondent.

This is the third appeal arising out of the administration of the Robert Bruce Cumming and Lois Wielen Cumming Trust (trust). The first appeal covered the trial regarding the removal of defendant and appellant Steven Robertson Cumming (Steven) as trustee and the determination of whether he had committed neglect and financial elder abuse against Lois Cumming (Lois).[1] (*Cumming v. Cumming* (Sept. 7, 2017, E066569) [nonpub. opn.], mod. Sept. 28, 2017 (*Cumming I*, E066569).) In the second appeal, Steven challenged the order denying his petition to remove respondent Natalie Blickenstaff (Blickenstaff) as trustee. (*Cumming v. Blickenstaff* (Aug. 16, 2019, E069282) [nonpub. opn.] (*Cumming II*, E069282).)[2]

In this appeal (*Cumming III*, E070538), we review the probate court's May 10, 2018 orders overruling Steven's objections to Blickenstaff's second and final account (second account), approving the second account, ordering service of documents by United States mail only (prohibiting electronic service), denying his motion to presume invalid service, denying his petition to establish final distributions based on his account, and denying his memorandum of costs. We conclude Steven has failed to carry his

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[1] Because the Cumming family members share a common surname, we use first names after initial introduction to avoid confusion. No disrespect is intended.

[2] On the court's own motion, we take judicial notice of our prior unpublished opinion in *Cumming I*, E066569, and the companion appellate record in *Cumming II*, E069282, to compile a coherent narrative. (Evid. Code, § 452, subd. (d); Cal. Rules of Court, rule 8.1115(b)(1).) "It is well accepted that when courts take judicial notice of the existence of court documents, the legal effect of the results reached in orders and judgments may be established." (*Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 185.)

burden as appellant of overcoming the basic presumption that the probate court's rulings are correct. We therefore affirm.

I. PROCEDURAL BACKGROUND AND FACTS[3]

A. Factual Overview.

Steven, Janet, and William are siblings. Their parents, Robert and Lois Cumming, established a trust. Robert died in 1991. In accordance with the trust agreement, Lois then divided the trust into Trust A, a revocable trust for which Lois was the trustee and retained the power to amend, and Trust B, a trust that became irrevocable on Robert's death but under which Lois was the income beneficiary while she was alive. Lois was the sole trustee of Trust A. Trust B provided for two trustees. Pursuant to the trust agreement, Steven became the successor trustee when Robert died. Lois was the other trustee. (See *Cumming I*, E066569.)

In May 2005, Lois suffered a stroke. She spent several months in the hospital and in rehabilitation facilities. On June 17, 2005, while Lois was residing in a rehabilitation facility following her stroke, Steven obtained a power of attorney appointing him Lois's attorney in fact. She returned home in September 2005. In the weeks immediately after the stroke, Steven moved into Lois's house. He remained there to care for her until her death in April 2013. While he lived with Lois, Steven's personal bills and expenses were paid by the trusts; however, he failed to provide records to back up his explanations for his financial actions. (See *Cumming I*, E066569.)

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[3] The facts are taken from our previous nonpublished opinion in this case. (See *Cumming I*, E066569.)

B. Appeal from the Petition Filed by Janet and William (*Cumming I*, *E066569*).

On December 31, 2013, Janet and William filed a petition, pursuant to Probate Code sections 16080 and 17200, subdivision (b)(5), (6), (7) and (10), to compel Steven, as the acting successor cotrustee of the trust to: (1) report information concerning the trust; (2) account; (3) allow beneficiaries and/or the other successor cotrustee reasonable access to view trust property; and/or (4) remove the acting successor cotrustee and appoint a private professional second successor trustee. The petition alleged, among other things, that Steven, as acting successor cotrustee, had maintained exclusive control over the trust's assets, had used them for his own benefit, and had refused requests by Janet for information concerning the trust's assets. (See *Cumming I*, E066569.)

On March 26, 2014, Blickenstaff was appointed as trustee of the trust pursuant to a petition filed by Janet and William. On January 20, 2015, Janet and William filed a supplement to the original petition, under Probate Code section 259 and Welfare and Institutions Code sections 15610.30 and 15610.57, alleging that Steven had committed neglect and financial elder abuse against their mother, Lois, and seeking to disinherit Steven. (See *Cumming I*, E066569.) The matter was tried before the probate court. On June 24, 2016, the court entered judgment. The court found that Steven had breached his duties as trustee in a number of specified respects, but found the evidence insufficient to establish financial elder abuse. The court also found that Steven was liable for neglecting his mother, and that he acted recklessly and in bad faith. The court removed Steven as trustee. It also deemed him to have predeceased Lois and found that he was not entitled

to "take further" under the will, the trust, or by intestate succession. It denied him compensation for his services for failure to submit a bill within one year after Lois's death and denied his claim for attorney fees. It also surcharged him a total of $193,136. The surcharge was doubled to $386,272, pursuant to Probate Code section 859. (See *Cumming I*, E066569.)

On July 29, 2016, Steven appealed the judgment. We reversed in part and affirmed in part, finding the probate court did not award damages under Probate Code section 259 and, thus, could not disinherit Steven. (See *Cumming I*, E066569.) Otherwise, we upheld the court's rulings and findings including the full surcharge; however, we found factual questions: (1) whether Steven's one-third share of the trust estate and of any other assets Lois may have possessed outside of the trust would exceed the amount of the surcharge, and (2) whether Janet had issue or had attained the age of 40 before her death.[4]

C. Steven's Petition to Remove Trustee and Objections to First Accounting.

On July 14, 2016, during the pendency of the appeal in *Cumming I*, E066569, Blickenstaff filed her first and final account (first account) after being appointed as trustee on July 11 (she had previously served as interim trustee). Six days later, she filed a supplement to the first account. On July 25, Steven moved ex parte to (1) remove Blickenstaff as trustee on grounds of perjury and malfeasance, and (2) order a proper

[4] Janet died in August 2016, and William was designated her sole beneficiary.

report and accounting. Four days later, the ex parte motion was denied because it was not an emergency, and the matter was set for hearing in September 2016.

On August 1, 2016, Steven filed objections to Blickenstaff's first account and supplement; the objections offered the same arguments Steven had made in his motion to remove Blickenstaff. On September 12, the probate court overruled Steven's objections, but declined to approve the first account and distribution pending the appeal. Steven's motion to remove Blickenstaff was continued to December 8 but taken off calendar for lack of service.

On December 9, 2016, Steven filed a second petition to remove Blickenstaff as trustee for perjury and malfeasance. On April 10, 2017, the probate court reviewed Steven's petition and the trustee's response, and heard argument by the parties. The court denied the petition for lack of standing and lack of merit. The court found Steven lacked standing because he had been disinherited, and his surcharges exceeded his interest in the trust. However, the court indicated Steven's standing could change if the appeal on the issue of disinheritance was resolved in his favor. Regarding lack of merit, to the extent Steven's claims and arguments repeated those raised in his objections to Blickenstaff's accounting, they were denied because they had already been decided. (See *Cumming II*, E069282.)

On September 7, 2017, we issued our opinion in *Cumming I*, E066569, and filed a modification on September 28.

On October 6, 2017, Steven appealed the denial of his petition to remove Blickenstaff as trustee.

D. Steven's Memorandum of Costs, Objections to Second Account, and Petition to Establish Distribution Based on His Account.

On December 7, 2017, Blickenstaff filed her second account (supplemented on Jan. 25, 2018) and petitioned for its settlement and orders of final distribution. The corpus of the trust, after expenses and beneficiary distributions, was $563,771.45. The beneficiary distributions during the accounting period totaled $397,250. If the beneficiary distributions ($397,250 + $69,000[5] = $466,250) were added back into the trust, the total amount available would have been $1,030,021.45 ($563,771.45 + $466,250 = $1,030,021.45). One-third of that amount is $343,340.48. Because Steven had been surcharged $386,272, an amount that exceeds his one-third interest in the trust, he was not entitled to any further distribution. (See *Cumming I*, E066569 & *Cumming II*, E069282.)

On January 2, 2018, Steven filed a petition to establish final distributions based on his final account and report (Steven's account). Two weeks later, he filed a memorandum of costs[6] and a reply addressing this court's remittitur. On February 14, he objected to the second account. On February 28, William filed an opposition to Steven's memorandum of costs asking the probate court to strike the request for fees on appeal.

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[5] According to Blickenstaff's first account, she paid $69,000 to the beneficiaries as follows: $37,000 to Janet, $24,000 to William, and $8,000 to Steven.

[6] In *Cumming I*, E066569, we awarded costs on appeal to Steven.

On March 13, this court recalled the remittitur in *Cumming I*, E066569, and a new remittitur was filed on March 22. On March 26, Steven filed an amended memorandum of costs. Three days later, William filed a motion to tax or strike costs.

On May 10, 2018, the probate court conducted a hearing on the second account and other pending matters. According to the record, the court (1) reviewed the remittitur, (2) overruled Steven's objections to, and approved, Blickenstaff's second account,[7] (3) ordered service of documents by United States mail only (prohibiting electronic service), (4) denied Steven's motion to presume invalid service, and (5) denied the petition to establish final distributions based on Steven's account. Regarding Steven's account, the probate court found that it was "contrary" to this court's ruling in *Cumming I*, E066569, and had "no legal basis." As for Steven's memorandum of costs, the court recognized Steven had filed two memoranda of costs and ruled the second superseded the first. The court granted William's motion to strike costs in its entirety, finding "no legal basis for any of the claimed items in the memoranda of costs." In short, all rulings were against Steven, and the court authorized payment of all legal and trustee fees and payment of $350,000 to William.

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[7] The probate court stated: "The Court has approved the second and final accounting by [Blickenstaff]. That second and final accounting showed total assets of $553,090.22. With the total value of the estate having gone down from $1,136,390.22 from the first accounting to $553,090.22, the Court finds that the value of the estate would have to be more than $1,158,816, three times $386,272, in order for [Steven's] share to exceed his surcharges. [¶] The Court finds this will simply never happen. There is no reasonable chance that [Steven's] share will ever exceed his surcharge."

The same day, Steven appealed the rulings of the probate court, but he did not seek a stay of the court ordered payments.[8]

II. DISCUSSION

A. Preliminary Observation.

Steven's opening brief is at times difficult to understand, and he often fails to support legal arguments with appropriate analysis that applies legal authority to the facts of his case. (See Cal. Rules of Court, rule 8.204(a)(1)(B) ["Each brief must [¶] . . . [¶] [s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority."]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116.) Notwithstanding these procedural issues, Steven asserts many alleged deficiencies in the probate court's proceedings, most of which appear to involve issues that were not designated in Steven's notice of appeal. Our review is limited to the issues raised in his notice of appeal directed at the probate court's orders on May 10, 2018. Thus, we do not consider any deficiencies to the court's actions that occurred prior to April 10, 2017, because they were raised, *or should have been raised*, in Steven's prior appeals in *Cumming I*, E066569, and *Cumming II*, E069282. (See Code Civ. Proc., § 906.)

Although Steven represents himself, he has the same burden to demonstrate reversible error as he would if he were represented by counsel. "'A fundamental principle of appellate practice is that an appellant "'must affirmatively show error by an

[8] William died in August 2018.

adequate record. . . . Error is never presumed. . . . "A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent."""""" (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 639.) Additionally, an appellant has the burden of overcoming the presumption that a judgment is correct by presenting "an analysis of the facts and legal authority on each point made," and by supporting the "arguments with appropriate citations to the material facts in the record. If he fails to do so, the argument is forfeited." (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.)

Applying these principles to the present case, we conclude Steven did not meet his burden as appellant of overcoming the basic presumption that the probate court's rulings are correct.

B. Steven's Challenges to the First Account are Untimely.

Steven contends the probate court's ruling on the first account is null and void because the court violated the stay pending his appeal in *Cumming I*, E066569. He further attacks the first account, which was settled by court order in September 2016. We summarily reject his claim of error. As a matter of law, Steven's right to make such a claim was lost by his failure to timely appeal from the subject order. (*Powell v. Tagami* (2018) 26 Cal.App.5th 219, 222, fn. 2 ["An order settling an account is appealable."]; *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8 ["California follows a 'one shot' rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited."].) We will not review or disturb the trial court's orders or rulings from which an appeal could previously have been taken but was not. (*In re Marriage of*

Rifkin & Carty (2015) 234 Cal.App.4th 1339, 1347 ["It is well established that an appellate court may not review a decision or order from which an appeal could previously have been taken."]; Code Civ. Proc., § 906.)

Because Steven failed to appeal the probate court's order approving the first account, that order has become final and binding, not subject to collateral attack in a subsequent appeal. (*Powell v. Tagami*, *supra*, 26 Cal.App.5th at p. 222, fn. 2; *Estate of Gikison* (1998) 65 Cal.App.4th 1443, 1450, fn. 5 ["The orders listed as appealable in the Probate Code must be challenged timely or they become final and binding. They may not be collaterally attacked in a subsequent appeal from the final order of distribution."]; *Estate of Reed* (2017) 16 Cal.App.5th 1122, 1127 ["'The orders listed as appealable in the Probate Code must be challenged timely or they become final and binding.'"]; see *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1106-1107 [claims not raised are barred under the doctrine of res judicata by the order on the motion, which was not appealed].)

Moreover, we reject Steven's claim the probate court lacked jurisdiction to rule on the first account. Although the appeal in *Cumming I*, E066569, was pending, the probate court was not divested of all jurisdiction. (*Estate of Kennedy* (1948) 87 Cal.App.2d 795, 797-798 [an appeal from orders confirming a special administrator's sale of estate property did not deprive the probate court of jurisdiction to determine a will contest]; Prob. Code, § 1310, subd. (b) ["Notwithstanding that an appeal is taken from the judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary, . . . from time to time, as

if no appeal were pending. All acts of the fiduciary pursuant to the directions of the court made under this subdivision are valid, irrespective of the result of the appeal. An appeal of the directions made by the court under this subdivision shall not stay these directions."].) During the administration of the estate, the probate court "is authorized to determine the validity of wills and of creditors' claims, the rights of rival heirs, the necessity of sales and other incidents of winding up an estate. Each act of the court is an independent step in the administration. A decision as to one is not an adjudication of the others and does not divest the court of the power to hear and determine problems that are collateral to the proceeding in which an appealed order has been rendered. [Citations.] An appeal from a prior order made in the course of administration of an estate does not suspend the powers of the probate court to make further orders. [Citation.] A statute that would prohibit the probate court from administering an estate pending the appeal of an order made in due course would be intolerable." (*Estate of Kennedy,* at p. 798; see *Estate of Thayer* (1905) 1 Cal.App. 104, 106 [lower court had jurisdiction to settle the final account during pendency of an appeal of the order of partial distribution].)

C. Steven's Petition to Establish Final and Conclusive Accounting Does Not Create a Material Issue of Fact.

Steven asserts his petition to establish a final and conclusive account (Steven's account) contains "disputed material facts" such that the probate court abused its discretion by not setting a contested hearing on the competing petitions for estate settlement (the second account & Steven's account). We find no abuse of discretion.

A review of Steven's account shows that he misrepresented this court's opinion in *Cumming I*, E066569. Steven claimed Janet was not entitled to a share of the trust; however, in *Cumming I*, we held that if Janet had attained the age of 40 by the date of her death, her right to distribution of her full share of the trust had vested. (See *Cumming I*, E066569.) Steven acknowledged that Janet was born in 1954 and was over the age of 40 at the time of her death; therefore, her estate is entitled to her full share of the trust assets. Moreover, Steven's account is predicated on a misrepresentation that because Janet had no issue, her share should go to the surviving beneficiaries, William and Steven. Not so. Having attained the age of 40 by the date of her death, Janet's share in the trust vested. (See *Cumming I*, E066569.)

Because Steven's account was based on misrepresentations and unsupported contentions, it failed to present any "disputed material facts" to warrant an evidentiary hearing.

D. The Probate Court Properly Struck Steven's Memorandum of Costs.

Steven contends the probate court erred in denying his costs awarded on appeal in *Cumming I*, E066569. We disagree.

In Steven's amended memorandum of costs filed on March 26, 2018, he requested $69,000 in "fees," based on a "SALARY OF $3,000 PER MONTH PER AGREEMENT

ATTACHED DATED MAY 16, 2013."[9] He crossed out the word "Attorney" before the word "fees"; however, he offered no support for his right to any fees. On March 29, 2018, William filed a timely motion to tax or strike costs. The court granted the motion to strike in its entirety, finding "no legal basis for any of the claimed items in the memoranda of costs."

Steven contends William's opposition to Steven's memorandum of costs was untimely and procedurally defective, and the probate court erred in addressing "the memorandum of costs in an unnoticed hearing."[10] We disagree. Because we recalled the remittitur in *Cumming I*, E066569, and reissued it on March 22, 2018, Steven had to file a second memorandum of costs, which the probate court deemed to supersede the first one. A timely motion to tax or strike costs followed. Other than claiming William's timely motion to tax or strike costs should not have been considered because it "supplement[ed]" his prior untimely opposition to Steven's memorandum of costs, Steven offers no argument challenging the merits of the probate court's decision. Since Steven's memoranda of costs failed to establish a legal basis for his claim for fees, along

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[9] As previously stated, the probate court noted Steven had filed two memoranda of costs (the first on Jan. 16, 2018, with William's opposition filed on Feb. 28; and the second on Mar. 26, with William's motion to tax costs filed on Mar. 29) and ruled the second superseded the first.

[10] Generally, a response to a memorandum of costs must be filed within 20 days after service; however, a court may allow an additional 30 days. (Cal. Rules of Court, rule 3.1700(b)(3).)

with what the fees are and how they were incurred, we conclude the court properly granted William's motion to tax or strike costs.[11]

E. Steven's Claim that the Probate Court's May 10, 2018 Rulings Are Prejudicial Errors is Waived.

In a confusing and disjointed argument, Steven contends William refused to settle the case in bad faith, counsel for William and Janet misled the probate court with false testimony regarding this court's opinion in *Cumming I*, E066569, and the probate court disregarded the trust agreement and committed prejudicial error in "denying [him] any due process in this case beginning with the first hearing on 03/18/2014." However, Steven has failed to carry his burden of presenting "*argument and legal authority* on *each point* raised. This requires more than simply stating a bare assertion that the judgment, or part of it, is erroneous and leaving it to the appellate court to figure out why; it is not the appellate court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. [Citations.] [¶] When appellant asserts a point but fails to support it with reasoned argument and citations to authority, the court may treat it as *waived* and pass it without consideration." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 8:17.1, p. 8-6.) Because Steven's argument

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[11] Even if we reached the merits, Steven, acting as his own attorney, was not entitled to recover attorney fees as a matter of law. (See *Atherton v. Board of Supervisors* (1986) 176 Cal.App.3d 433, 437-438 [when a party appears in propria persona, no attorney fees may be awarded].) If Steven requested fees other than attorney fees, he cited no legal authority to support his request, and we are not aware of any such authority. (See Code Civ. Proc., § 1033.5 [items allowable as costs under Code Civ. Proc., § 1032].)

on this issue disregards the well-established principles of appellate review, we are forced to conclude he has not shown any legal or factual reason to upset the probate court's determination. (*In re Marriage of Jovel* (1996) 49 Cal.App.4th 575, 587-590.)

F. The Probate Court Properly Denied Steven's Objection to Service.

Steven challenges the probate court's denial of his objection to mandating service of documents by United States mail only (prohibiting electronic service). Steven claims: (1) William and Blickenstaff disobeyed the court's order when William served his documents by electronic service; (2) Blickenstaff failed to file a valid proof of service; and (3) the court's refusal to allow electronic service of documents contradicts its previous order allowing electronic service. The record does not support Steven's challenge to the court's action, therefore, we reject it.

According to Steven, Blickenstaff waived any objection to electronic service because she never objected in 2014 and 2015 when the probate court ordered electronic service of documents. We disagree. The portions of the record Steven cites in support of his argument provide a logical reason for electronic service in 2014 and 2015: either (1) time for service had been shortened or (2) Steven refused to provide a mailing address and demanded electronic service. Under those limited circumstances, the court allowed electronic service. However, there is no indication the court ordered, or authorized, electronic service outside those occasions.

Similarly, the record does not support Steven's claims that William and Blickenstaff disobeyed the court's order regarding service of documents. Steven claims William served his opposition to Steven's memorandum of costs electronically; however, the record shows service was made by United States mail. Although the proof of service identifies two dates (Jan. 1 & Feb. 27, 2018), the earlier date (Jan. 1) appears to be a scrivener's error since it predates the predicate motion that was filed on January 1. (See *ante*, fn. 9.) Steven does not claim he did not receive service of the opposition. Likewise, Steven does not claim he did not receive service of Blickenstaff's reply to Steven's objections to the second account. According to the record, Blickenstaff filed a valid proof of service of her reply, and Steven received it. The probate court therefore properly denied Steven's objection to mandating service of documents by United States mail only (prohibiting electronic service).

III. DISPOSITION

The orders are affirmed. Respondent to recover costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.